Supreme Court, U.S.
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No. 03 499 SEP 29 2003

In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED

1. Is it constitutionally permissible for a public school to have a patronage policy, which requires its administrative level employees to enroll their school-age children in public schools? If not, when was this constitutional restriction on public schools clearly established?

2. Can federal constitutional law be clearly established for purposes of qualified immunity analysis when (A) district and circuit judges disagree about the controlling legal principles and (B) intervening circumstances, such as major education reforms, change the legal landscape under which government officials operate? Should a public school superintendent be held to a higher standard than federal judges regarding knowledge of constitutional law?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Dr. Herman Smith (Dr. Smith), an individual.

Respondent: Ms. Karen Jo Barrow (Ms. Barrow), an individual.

No corporate entity is a party to this petition for a writ of certiorari. Thus, there are no parent corporations or publicly held companies owning ten percent or more of the corporation's stock to disclose pursuant to the requirement of Rule 29.6.

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at *Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003).[1] The Fifth Circuit's opinion is reprinted in the Appendix at 1-8. The Fifth Circuit's order denying Dr. Smith's Petition for Rehearing En Banc is found at Appendix 32-33. The district court did not publish its opinion in this case. However, the opinion is found on Westlaw. *Barrow v. Greenville Indep. Sch. Dist.*, 2002 WL 255484 (N.D. Tex. 2002), *rev'd*, 332 F.3d 844 (5th Cir. 2003). The district court's opinion is reprinted in the Appendix at 9-26. The district court's judgment is found at Appendix 27-28. The district court's order denying Ms. Barrow's motion to alter or amend judgment is found at Appendix 29-31.

JURISDICTION

The Fifth Circuit filed its decision on June 2, 2003 and revised its opinion on June 17, 2003. The Fifth Circuit chose to treat Dr. Smith's Petition for Rehearing En Banc as a Petition for Panel Rehearing, which it denied on July 2, 2003. Dr. Smith has not sought any extension of time for filing his Petition for a Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] Greenville Independent School District, Dr. Smith's former employer, is not a party to this petition.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions are the First and Fourteenth Amendments. App. 34. The relevant statutory provision is 42 U.S.C. § 1983. App. 34-35.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND.

Ms. Barrow brought suit against Dr. Smith for the following alleged violations of her rights:

1. The right to protection of her family relationship under the First and Fourteenth Amendments;
2. The right to direct her childrens' education under the First and Fourteenth Amendments;
3. The right of familial privacy under the First and Fourteenth Amendments;
4. The liberty and due process rights under the Fourteenth Amendment to make decisions concerning familial relationships and practices; and
5. The right under the First Amendment to the free exercise of religious faith by choosing to educate one's children in a religious educational institution.

App. 14.

Dr. Smith sought summary judgment on the basis of qualified immunity. App. 10. Judge Fitzwater granted Dr.

Smith's motion. App. 9. Ms. Barrow appealed. App. 1-2. The Fifth Circuit reversed. App. 2. In its opinion, the Fifth Circuit said, "[o]ur inquiry at this stage is limited to the question whether there is a recognized constitutional right and not whether that right is grounded in the First Amendment, the Fourteenth Amendment, or both." App. 4.

The district court had jurisdiction over this matter because it presents federal questions under the United States Constitution. *See* 28 U.S.C. § 1331 (2000). The Fifth Circuit had jurisdiction to review the district court's final decision. *See* 28 U.S.C. § 1291 (2000).

II. FACTUAL BACKGROUND.

For purposes of resolving the qualified immunity issue only, Dr. Smith assumed in the district court and assumes here "the factual truth of Ms. Barrow's assertion that he declined to consider, interview, or recommend her unless she placed her children in the public school system." *See* District Court decision, App. 10. With that assumption, the pertinent facts on appeal are as follows:

In the summer of 1998, Ms. Barrow was employed as a teacher by Greenville ISD, where Dr. Smith served as superintendent. During the summer, an administrative position became open, that of assistant principal at a middle school. During the consideration of the applicants by the school's administrative council,[2] a member of the council mentioned Ms. Barrow as a potential candidate.

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[2] The administrative council is made up of school employees. It is not to be confused with the board of trustees of the school district.

The council then discussed Ms. Barrow's qualifications. One council member, on her own initiative, mentioned that Ms. Barrow's children attended private school.

At the conclusion of the discussion, the council decided that Ms. Barrow should be approached to see if she had any interest in the administrative level position. Ms. Barrow met with Dr. Smith, and he is alleged to have said that Ms. Barrow's children would have to be enrolled in public schools before she could be considered for a promotion to an administrative position. Ms. Barrow was not chosen for the position.

Ms. Barrow admitted that Dr. Smith's alleged actions were not motivated by any intent to discriminate against her on the basis of her religion. Ms. Barrow instead claims that Dr. Smith discriminated against her for choosing to educate her children in private school. *See* Fifth Circuit opinion, App. 1-8.

REASONS FOR GRANTING THE PETITION

I. SUMMARY OF REASONS FOR GRANTING THE PETITION.

The petition should be granted for two reasons. First, the petition should be granted because the Fifth Circuit has decided an important question of constitutional law that has not been, but should be, settled by this Court. Specifically, the Fifth Circuit held: (1) that a public school's patronage policy, which applied only to administrative level school officials, was unconstitutional and (2) that this rule of constitutional law was clearly established such that no reasonable public school official could have

concluded that such a policy was lawful. App. 8. This court, however, has never decided the issue and, in 1975, Chief Justice Burger expressly stated that the issue was unresolved. *Cook v. Hudson*, 429 U.S. 165 (1976) (Burger, C.J., concurring) (dismissing petition for writ of certiorari).

Second, the petition should be granted because the Fifth Circuit has decided an important federal question in a way that conflicts with the relevant decisions of this Court and of other United States Courts of Appeals. Specifically, the Fifth Circuit has decided an important question regarding the proper analytical approach to determine clearly established law in the context of qualified immunity. The Fifth Circuit did not follow this Court's qualified immunity standards because it denied qualified immunity even though the Fifth Circuit's own precedents regarding patronage policies are far from clear. Moreover, the Fifth Circuit's decision conflicts with the decisions of other federal appellate courts that have held that if federal judges disagree about an issue of constitutional law, the issue cannot be clearly established for purposes of qualified immunity analysis. The Fifth Circuit, unlike the Sixth and Eleventh, improperly holds public school superintendents to a higher standard than federal judges regarding knowledge of constitutional law.

A. The Law Regarding Patronage Policies is Not Clearly Established.

The Fifth Circuit addressed the patronage issue in 1975 and concluded that there was no constitutional prohibition to a patronage policy. *Cook v. Hudson*, 511 F.2d 744, 749 (5th Cir. 1975). The Supreme Court granted writ,

but dismissed it as improvidently granted. *Cook v. Hudson*, 429 U.S. 165 (1976). Chief Justice Burger concurred in the dismissal. *Id.* However, he said:

> . . . I emphasize that our decision to dismiss the writ of certiorari as improvidently granted intimates no view on the question of when, if ever, public school teachers or any comparable public employees may be required, as a condition of their employment, to enroll their children in any particular school or refrain from sending them to a school which they, as parents, in their sole discretion, consider desirable . . . .

Id. (Burger, C.J., concurring). The patronage issue raised twenty-eight years ago in *Cook* continues to be analyzed in different ways by different judges in the Fifth Circuit and the Ninth Circuit. Furthermore, the recent nationwide education reforms (the No Child Left Behind Act) evolved from earlier Texas education reforms. Both the Texas and federal statutes impose competitive business models on public schools. School administrators throughout our nation will grapple with patronage issues from the national effects of the No Child Left Behind Act. By granting the petition, this Court has the opportunity to eliminate uncertainty and costly litigation and provide clear guidance to public school administrators.

B. The Fifth Circuit's Qualified Immunity Analysis Conflicts with this Court's Teachings and the Analysis of Other Circuit Courts.

The Fifth Circuit's analysis not only contradicts this Court's teachings on qualified immunity, but also raises previously unanswered questions about qualified immunity analysis. One learned treatise on section 1983

litigation begins its discussion of qualified immunity analysis by saying:

> In evaluating whether the federal law was clearly established on the date of the alleged wrong, the courts have had difficulties determining (1) the degree of factual correspondence required between the relevant precedents and the case at hand, and (2) the appropriate body of case law to consider. The Supreme Court has provided guidance on the first issue, but not on the second.

Schwartz & Kirklin, *Section 1983 Litigation: Claims and Defenses*, Vol. 1B, § 9.23, p. 385 (3d ed. 1997). Specifically, this case raises the issue of whether a public school official can be denied qualified immunity when the federal district judge hearing the case determines that the law was not clearly established and when federal appellate court judges disagree about the constitutionality of the alleged act.

This case also raises issues regarding the required degree of similarity between the case at bar and historic precedents. Neither of the cases relied on by the Fifth Circuit involved an employee in an administrative position. Moreover, both were based on racial segregation issues in Mississippi. One of the cases relied on a Mississippi statute that expressly prohibited the complained-of conduct; no similar statute is found under Texas law. Thus, whether a public official receives fair warning by similar, but distinguishable case precedent is at issue and should be clarified. This issue affects public officials throughout the United States who must act in the midst of constitutional uncertainty.

II. A PROHIBITION OF PATRONAGE POLICIES IS NOT CLEARLY ESTABLISHED.

The Fifth Circuit held Ms. Barrow had a "constitutional right to educate her children in private school." App. 1. Ms. Barrow, however, wanted to work as an administrator in a public school while enrolling her own children in a private school. The question is not whether a parent has a right to educate her children in a private school, but whether an administrator may be required to show loyalty toward and confidence in the public school she administers.

Federal courts disagree about whether a person may both demand public employment and refuse to send her child to a public school. The decisions point in different directions, leaving public administrators to guess at what the law requires, with no clear guidance. As one Fifth Circuit jurist said, a parent's right to direct her child's education does not equate to a clear right to demand public employment. *Cook v. Hudson*, 511 F.2d 744 (5th Cir. 1975) (J. Coleman's view), *cert. dism'd*, 429 U.S. 165 (1976).

A. This Court's Prior Cases Do Not Establish that a Patronage Policy is Unconstitutional.

This Court's prior cases in this area of the law do not address the patronage policy issue. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Meyer*, this Court held that the Fourteenth Amendment barred a state from criminally prosecuting an educator for teaching a foreign language to a young child. *Meyer*, 262 U.S. at

396-401. In *Pierce*, this Court struck down a state statute which forced all parents to send their children to public schools. *Pierce*, 268 U.S. at 530. In *Yoder*, this Court held that a criminal statute mandating children, including Amish children, attend private or public schools until they reach sixteen years of age violated the Free Exercise Clause. *Yoder*, 406 U.S. at 207-14.

These cases stand broadly for the right of parents to direct the education of their children, within bounds. They do not establish, clearly or otherwise, that a public school must hire an administrator who refuses to educate her own children in the schools she hopes to administer. This Court's prior cases strike down criminal sanctions for educating children in certain ways; none address the employment of educators. The fact that these cases do not stand for the proposition asserted by Ms. Barrow is confirmed by Chief Justice Burger's concurrence in the dismissal of the petition for writ of certiorari in *Cook*. *Cook*, 429 U.S. at 166.

B. Fifth Circuit Cases Decided after *Wisconsin v. Yoder* Have Varied Results and Do Not Provide Clear Guidance

Four Fifth Circuit cases address factual scenarios where public school employees were terminated or demoted after their children began attending other educational institutions. In three of these cases, school employees in Mississippi chose to send their children to private, all-white schools. In the fourth, the son of a football coach at the University of Southern Louisiana chose to play football for a rival college. Each of these cases were brought based on constitutional grounds. The cases demonstrate the fragmented nature of the Fifth

Circuit's analysis in this area of law. A synopsis of these cases follows.

1. *Cook v. Hudson*

In *Cook v. Hudson*, the Calhoun County Board of Education refused to renew the teaching contracts of three teachers who sent their children to an all-white, secular private school. *Cook v. Hudson*, 511 F.2d 744, 744-45 (5th Cir. 1975). The teachers brought suit alleging that their First Amendment right of free association and their Fourteenth Amendment rights to due process and equal protection had been violated. *Id.* at 745. The district court upheld the Board's action "to eliminate racial discrimination." *Id.* On appeal, two members of the panel voted to affirm, but for different reasons; the third member of the panel dissented and would have reversed. *Id.* at 747-48, 750. The teachers sought a motion for rehearing en banc. *Cook v. Hudson*, 515 F.2d 762 (5th Cir. 1975). The motion was denied "albeit by the narrowest margin possible," with five circuit judges dissenting. *Id.*

The *Cook* decision is splintered and uncertain. Circuit Judge Coleman expressed his views first, stating:

> [T]hose of the general public, who pay the taxes, who keep the public school doors open, and who depend on those schools to educate their children, have a right to expect undivided teacher dedication, free of any real or apparent conflicts of interest. Here, the teacher-appellants seek to defeat that public right by saying that because they have a right to send their children to private schools they also have the constitutionally guaranteed right to be employed in the public schools in defiance of the considered judgment of the

> school board that such a practice is not good for the schools which they have assumed an obligation to foster and maintain. I simply do not believe that the Constitution may be stretched so far.

Cook, 511 F.2d at 749. Judge Coleman's opinion strikes at the heart of Ms. Barrow's claim. While Ms. Barrow has a right to send her child to the school of her choice, she does not have a right to demand administrative level public employment in the school system she rejects for her own children. *See id.*

Circuit Judge Roney also voted to affirm the district court's decision in *Cook*. *Id.* at 749. However, his view was based on the "particular facts" of the case where the successful operation of the public schools under court-ordered desegregation was seriously challenged by the existence of a secular private, all-white school. *Id.* at 749-50.

Circuit Judge Clark dissented and expressed views generally favorable to Ms. Barrow's position. *See id.* at 750-57. However, Judge Clark's views did not prevail. *See id.* at 750. Judge Clark recognized:

> The problem in any case is to arrive at a balance between the interests of a teacher, as a citizen, in (the exercise of a fundamental right,) and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 754 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). The balancing test requires public school superintendents to balance competing interests. In performing this balance, superintendents lack adequate

judicial guidance from the Fifth Circuit or this Court. A balancing test indicates a case-by-case type of analysis that does not lend itself to bright line rules that can be considered clearly established.

The Supreme Court granted writ in *Cook*,[3] but later dismissed the writ as improvidently granted. *Cook v. Hudson*, 429 U.S. 165 (1976). Chief Justice Burger concurred in the dismissal. *Id.* at 166. However, he said:

> . . . I emphasize that our decision to dismiss the writ of certiorari as improvidently granted intimates no view on the question of when, if ever, public school teachers or any comparable public employees may be required, as a condition of their employment, to enroll their children in any particular school or refrain from sending them to a school which they, as parents, in their sole discretion, consider desirable . . . .

Id. (Burger, C.J., concurring). With the full benefit of *Meyer*, *Pierce*, and *Yoder*, Chief Justice Burger believed the question before the Supreme Court was an open one. The issue remains unresolved because this Court chose not to review *Cook*.

2. *Brantley v. Surles*

In *Brantley v. Surles,* the Plaintiff managed the cafeteria of an elementary school in Mississippi. *See Brantley v. Surles*, 718 F.2d 1354, 1355 (5th Cir. 1983).

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[3] *Cook v. Hudson*, 424 U.S. 941 (1976).

Before the start of the school year, Ms. Brantley transferred her son from a public high school to a private, segregated school. Her employment was terminated, and she sued for an alleged violation of her constitutional right to direct the education of her child. The district court dismissed Ms. Brantley's suit for failure to state a claim. *Id.*

On review the Fifth Circuit said, "[t]he parental interest in direction and control of a child's education is central to the family's constitutionally protected privacy rights." *Id.* at 1358 (citing *Meyer*, 262 U.S. 390). The Fifth Circuit concluded the state could, however, "legitimately interfere with the constitutionally protected conduct of a public school employee whenever that conduct materially and substantially impedes the operation or effectiveness of the educational program." *Id.* at 1359 (citing *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969)).

The *Brantley* panel found that the case before it "differs from *Cook* in several respects . . . and is not controlled by it." *Brantley*, 718 F.2d at 1359, n.7. Specifically, the panel distinguished *Cook* because Mississippi had enacted a statute prohibiting the termination of public educators whose children attended private schools. *Id.* (citing MISS. CODE ANN. § 37-9-59).

On remand, the district court concluded that Brantley was fired for legitimate, nondiscriminatory reasons. *Brantley v. Surles*, 765 F.2d 478, 479 (5th Cir. 1985). The Fifth Circuit disagreed. *Id.* The panel concluded, on balance, the school "board had no interest sufficient to justify" terminating Brantley, a cafeteria worker. *Id.* at 482. *Brantley*, as *Cook*, leaves the law murky and requires administrators to engage in a case-by-case, fact-specific balancing test.

3. *Fyfe v. Curlee*

Ms. Fyfe worked as a secretary in a Mississippi elementary school. *Fyfe v. Curlee*, 902 F.2d 401, 402 (5th Cir. 1990), *cert. denied,* 498 U.S. 940 (1990). She enrolled her daughter in an all-white private school. *Id.* At the same time, local black citizens began boycotting local businesses in an attempt to force the school system to hire more black teachers and administrators. *Id.* Ms. Fyfe was asked to find another job, but she refused. *Id.* at 402-03. The school placed Ms. Fyfe in a "less responsible, more menial job," and she filed suit. *Id.* at 404. The Fifth Circuit stated, "[t]he question whether specific conduct or speech is protected by the First Amendment is ultimately a question of law." *Id.* at 403. The panel found Ms. Fyfe's transfer of her daughter to a private school was constitutionally protected. *Id.* The panel then turned to the question of whether Fyfe's conduct was detrimental to the operation of the school, and weighed the issue, using a balancing test. *Id.* at 405 (quoting *Brantley*, 718 F.2d at 1359) ("[In] the realm of public school employment, the court must balance the interests of the school employee with the interest of the state in promoting efficiency in the educational services which it provides through its school employees.") The balancing test is to be conducted by the court as a matter of law. Thus, once again, a case-by-case balancing test is referred to by the Fifth Circuit rather than any clear bright line rules prohibiting the policy.

4. *Kipps v. Caillier*

Kipps v. Caillier is yet another case where a panel of jurists could not agree on the constitutional issue presented by a terminated educator. *Kipps v. Caillier*, 197 F.3d 765 (5th Cir. 1999), *cert. denied,* 531 U.S. 816 (2000).

Mr. Kipps was an assistant football coach at the University of Southwestern Louisiana (USL). *Id.* at 766. His son, Kyle, a talented football player, was actively recruited by USL, Louisiana State University (LSU), and other schools. *Id.* at 766-67. USL's head coach told Kipps that if Kyle did not attend USL he must attend a college outside of Louisiana. *Id.* at 767. Kyle chose to attend LSU, and USL terminated Kipps' employment. *Id.*

The *Kipps* majority referred to Kipps' claimed constitutional interests as a "constitutional liberty interest in familial association" and stated whether such a constitutional liberty interest was implicated was "highly questionable." *Id.* at 768-69, n.4. However, the majority chose not to address whether Kipps had alleged a clearly established constitutional right. *Id.* at 768-69. The majority proceeded directly to the "objectively reasonable" analysis of qualified immunity. *Id.* (quoting *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999)). The majority held that it was objectively reasonable for a university to fire an assistant coach because his son chose to attend a rival school. *See id.* at 769. In a concurring opinion, Judge DeMoss stated that he would affirm because no clearly established constitutional right of Kipps' had been violated. *Id.* at 771-72.

On rehearing, the Fifth Circuit issued an order denying rehearing and addressing additional issues. *Kipps v. Caillier*, 205 F.3d 203 (5th Cir. 1999), *cert. denied,* 531 U.S. 816 (2000). The court was concerned about its precedent which "appears to require a court to first answer whether an existing constitutional right has been asserted" before deciding objective reasonableness. *Id.* at 204 (citing *Evans v. Ball*, 168 F.3d 856, 860 (5th Cir. 1999)). Although the majority earlier found Kipps' claim "highly

questionable," the majority did an about face and stated, "we have little trouble finding that a constitutional interest in familial association does, in fact, exist and was clearly established at the time Kipps was fired." *Id.* at 204.

Circuit Judge DeMoss concurred in the denial of the rehearing only, noting:

> On December 6, 1999, when the majority filed its original opinion in this case, it acknowledged that:
>
> > Whether a constitutional liberty interest is implicated by the facts of this case is highly questionable.
>
> *Kipps v. Callier*, 197 F.3d 765, 769 n.4 (5th Cir. 1999). Now, less than 90 days later and without citation to any relevant intervening decision, the majority jumps to the following conclusion:
>
> > We have little trouble finding that a constitutional interest in familial association does, in fact, exist and was clearly established at the time Kipps was fired.
>
> Majority Opinion, at 204. This 180 degrees turnabout permits the majority to at least superficially comply with our precedent requiring that it first address the first prong of the qualified immunity analysis, by finding that the Kippses' alleged a violation of a clearly established constitutional right, but then in the end, return to the actual holding of the original opinion. . . .

Id. at 206-07. Judge DeMoss believed the majority was "conflating the issues of whether a constitutional right exists in the abstract, and whether that right is implicated

on the facts alleged by the plaintiffs." *Id.* at 208. Judge DeMoss concluded that the "mere existence of a parent/child relationship" was insufficient to establish Kipps' cause of action against USL. *Id.*

The *Kipps* majority issued two opinions, going from a "highly questionable" right to a "clearly established" right with the stroke of a pen. The first *Kipps* decision was issued on December 6, 1999. On that date, which was sixteen months after Dr. Smith's alleged actions, the Fifth Circuit held the existence of the right Ms. Barrow asserts was highly questionable.

5. Comparison of Ms. Barrow's Claim to Fifth Circuit Decisions.

The facts asserted by Ms. Barrow do not come cleanly within the guidance of any of these cases. Rather, the cases addressed by the Fifth Circuit require a balancing test weighing different factors and obtaining different results. Moreover, neither *Brantley* nor *Fyfe* dealt with an employee administering the school's education programs. *Brantley*, 718 F.2d 1354 (cafeteria manager); *Fyfe*, 902 F.2d 401 (secretary). Because there has been no clear guidance, Dr. Smith has been left to weigh his chances as best he could. Ms. Barrow had no clearly established constitutional right to demand public employment, and Dr. Smith had no clear guidance. Dr. Smith should not be penalized if he made a mistake in attempting to weave the thread of vague constitutional law into the fabric of public school administration, particularly in light of the extensive educational reforms, which are discussed below.

C. Other Circuits Do Not Provide Helpful Guidance.

Case law from other circuits does not clarify the murky waters. The issue is, again, subject to different interpretations by different jurists.

1. *Stough v. Crenshaw County Board of Education*

The Crenshaw County Board of Education adopted a patronage policy prohibiting its employees from sending their children to private schools. *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984). Two teachers requested an exemption to enroll their children in a virtually all-white private school. *Id.* at 1480. The board denied the exemption and said it would terminate the teachers if they did not comply with the patronage policy. *Id.* The teachers filed suit, alleging the policy violated their First and Fourteenth Amendment rights by limiting their ability to direct and control the education of their children. *Id.*

The district court ruled in favor of the teachers. *Id.* The Eleventh Circuit panel affirmed on evidentiary, not policy grounds. *Id.* at 1482. Specifically, the court held:

> We do not today pass on the school board's policy itself. The board simply produced insufficient evidence to justify its application in this case. The order of the district court is therefore Affirmed.

Id. Stough is another case which provides inadequate guidance to school administrators on this complex constitutional issue.

2. *Peterson v. Minidoka County School District No. 331*

Peterson v. Minidoka County School District No. 331 also presents fragmented opinions. In fact, each jurist on the panel issued a separate opinion. *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351 (9th Cir. 1997), amended 132 F.3d 1258.

In *Peterson*, an elementary school principal was demoted to a teaching position after announcing that he was considering home schooling his children to educate his children with an aspect of God being the creator. *Id.* at 1355. The district court granted summary judgment in favor of Mr. Peterson and his wife, finding that their freedom of religion and freedom to direct their children's education had been violated. *Id.* at 1356.

Circuit Judge Noonan discussed *Yoder* and stated the constitutional right to exercise religion is a precious liberty but "not so absolute that its exercise may be enjoyed without collateral consequences if, in exceptional circumstances, that exercise impacts a compelling state interest." *Id.* at 1357 (citing *Yoder*, 406 U.S. at 215). Judge Noonan stated the school district could state a compelling interest if well-informed persons understood Peterson's act as a vote of no confidence in the school system, rather than the practice of religion. *Id.* On the facts of *Peterson*, Judge Noonan concluded the school district had not demonstrated a compelling interest. *Id.*

Circuit Judge Fletcher concurred in the result of Judge Noonan's opinion. *Id.* at 1360. Judge Fletcher reasoned that the vague concerns voiced by some teachers and parents that Peterson *might* lose effectiveness because he *might* home school his children were insufficient, on

balance, for the school district to terminate Peterson's employment. *Id.* at 1360-61. Judge Fletcher relied on the fact that Peterson was demoted when he was merely considering the possibility of home schooling his children. *See id.*

Circuit Judge Rymer dissented, saying: "Peterson did not prove that Minidoka's actions caused any substantial, concrete harm to his freedom to practice his religion." *Id.* at 1362. Ms. Barrow, like Mr. Peterson, is still free to believe in God as the creator and to teach her children that belief.

None of the three judges on the *Peterson* panel agreed on the parameters of the alleged constitutional right at issue. *Peterson* stands clearly for one proposition: Federal jurists have yet to agree on the tough constitutional issues pending before this Court. If the right Ms. Barrow asserts exists at all, it is far from clearly established.

3. The Law is Unclear.

While this Court has addressed the general rights of parents, no decision of this Court addresses facts similar to Ms. Barrow's claims. Chief Justice Burger's statement in the dismissal of the grant of certiorari in *Cook* supports Dr. Smith's position that *Meyer*, *Pierce*, and *Yoder* do not establish the right Ms. Barrow claims. *Cook*, 429 U.S. at 166 (Burger, C.J. concurring).

The Fifth Circuit has addressed three cases, other than *Cook*, where parents were terminated because their children did not attend the schools where the parents worked. Those cases involved employees who were not educational administrators. Moreover, those cases were

brought in the context of either racial segregation or football rivalries. There is simply no Supreme Court or Fifth Circuit case which provides clear guidance to Dr. Smith.

Public school administrators are forced to make decisions and run schools without the benefit of any clear, bright line tests. They must act in the face of uncertainty. They should not be penalized if their decisions do not correctly foresee nuances of constitutional law over which federal jurists frequently disagree, as these cases indicate. This Court should clarify the issues surrounding the constitutionality of patronage policies.

III. STANDARDS FOR ANALYSIS OF QUALIFIED IMMUNITY.

A. The Necessity of Clearly Established Law.

This Court has stated that the qualified immunity "clearly established" federal law standard is "the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *United States v. Lanier*, 520 U.S. 259, 270-71 (1997). If the law at the time of the alleged wrong was not clearly established, the official "could not reasonably be expected to anticipate subsequent legal developments, nor could he be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (a "police officer is not charged with predicting the future course of constitutional law").

Whether a right was clearly established at the time of the alleged violation is a question of law for the court to decide. *Harlow*, 457 U.S. at 818. While it is not necessary that the very action at issue have been previously ruled upon, or an exact standard been announced, the issue must be addressed with a certain amount of specificity. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition. . . ." *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

In *Wilson*, which was a Fourth Amendment unreasonable search case, this Court noted the general proposition that it is clearly established that the Fourth Amendment applies to the actions of police in searching homes. In the specific context of the case, however, the appropriate issue was "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful. . ." *Wilson*, 526 U.S. at 615. The Court went on to find the law on that issue was not clearly established in 1992. *Id.* at 615-18.

The Fifth Circuit, in the case at bar, erred in its analysis of the "clearly established law" issue because it approached the issue too broadly. "The right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is . . . to say that in the light of preexisting law the unlawfulness must be

apparent." *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *see also Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 (5th Cir. 2000). The "relevant inquiry focuses on whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions." *Poe v. Haydon*, 853 F.2d 418, 423-24 (6th Cir. 1988). Prior precedents of the Fifth Circuit itself recognize that for qualified immunity to be rejected, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) (citing *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)). "Further, the applicable law that binds the conduct of officeholders must be clearly established at the very moment that the allegedly actionable conduct was taken." *Wooley*, 211 F.3d at 919 (citing *Stem v. Ahearn*, 908 F.2d 1, 5 (5th Cir. 1990)).

These principles flow from the recognition that "[g]overnment officials are not required to err on the side of caution." *Marsh v. Butler County, Alabama*, 268 F.3d 1014, 1030 n.8 (11th Cir. 2001) (citing *Davis v. Scherer*, 468 U.S. 183, 195-96 (1984)). Public officials are subject to a plethora of voluminous, ambiguous, and contradictory rules. *See Davis*, 468 U.S. at 196. Moreover, "[o]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974)).

Qualified immunity accommodates "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978). The doctrine thus allows government officials to act with "independence and without fear of consequences" when the law is not clearly established. *Marsh*, 268 F.3d at 1030, n.8. In other words, "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993).

In this regard, several circuits, including the Fifth Circuit, recognize that law is less likely to be clearly established when it calls for a balancing of interests. The principles underlying the qualified immunity defense "have particular force where, as here, resolution of whether the defendant's conduct [is unconstitutional] is heavily dependent on a balancing or weighing against each other of different factors according to the degree they are present, in the matrix of facts constituting the particular context in which the asserted violation occurred." *Pierce*, 117 F.3d at 882; *see also Melton v. Oklahoma City*, 879 F.2d 706, 729 (10th Cir. 1989); *Manzano v. South Dakota Dep't. of Social Servs.*, 60 F.3d 505 (8th Cir. 1995); *Medina v. City of Denver*, 960 F.2d 1493 (10th Cir. 1992). As noted above, almost all cases addressing the patronage issue apply a balancing test. *See* cases discussed *infra*.

B. Circuits Other Than the Fifth Circuit Hold that Government Officials Cannot be Held to a Higher Standard of Legal Knowledge than Federal Jurists.

The Eleventh and Sixth Circuits hold that government officials cannot be held to a higher level of knowledge of constitutional law than federal judges. The Fifth Circuit, however, held that no qualified immunity attaches to Dr. Smith although the District Judge that heard this case concluded that the right asserted was not clearly established. *See* App. 1-8. Moreover, the Fifth Circuit's analysis simply ignores two of its own cases which demonstrate that the right was not clearly established within the Fifth Circuit. *See Kipps*, 197 F.3d 765; *Cook*, 511 F.2d 744.

The majority of federal courts that have spoken on the issue recognize that a governmental official should not be held to a higher standard of knowledge of federal constitutional law than federal judges. In a First Amendment case involving student expression, the Eleventh Circuit held "it would be inappropriate to hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose every day business it is to decipher the meaning of judicial opinions." *Denno v. School Bd. of Volusia County, Florida*, 218 F.2d 1267, 1274 (11th Cir. 2000). Public officials are not expected to possess "the kind of legal scholarship normally associated with law professors and academicians. A reasonable person standard adheres at all times." *Ward v. San Diego County*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

The Eleventh Circuit has also noted that government officials should not be held to a higher level of knowledge than federal district judges, saying:

> We take seriously the idea of "clearly established." When, around the pertinent time, a district judge is writing that a kind of conduct does not violate the Constitution at all, we need to be particularly careful before concluding that the law was already truly clearly established to be the opposite of the judge's opinion.

Marsh, 268 F.3d at 1039 n.20. Likewise, in *Key v. Grayson* the Sixth Circuit stated the principle in these words:

> If federal appellate judges could reasonably disagree over the applicability of the statutes, we do not believe that it can be fairly said that a reasonable official would have known that his conduct violated a clearly established right, ... much less that a reasonable official would have had "no doubt in his mind" that his conduct violated clearly established law.

Key v. Grayson, 179 F.3d 996, 1002 (6th Cir. 1999). Indeed, this Court has stated: "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. 603.

The Fifth Circuit simply ignored its own contrary case law, found in *Cook* and *Kipps*. Thus, the Fifth Circuit has contradicted the teachings of this Court and subjected a school administrator to money damages for picking the losing side of an amorphous and unsettled constitutional controversy. *See* App. 1-8.

C. Major Changes in School Law Altered the Legal Landscape for School Administrators.

In 1995, the Texas Legislature revolutionized public school administration in Texas by mandating that Texas public schools operate under a competitive business model. These major changes in Texas law were the model for the No Child Left Behind Act.[4] Senator Carper commented that "[w]e have injected competition and market forces into our public schools in ways that might have seemed impossible half a dozen years ago." 147 Cong. Rec. S13322-03, S13336 (daily ed. Dec. 17, 2001) (Statement of Sen. Carper).

Critically, these national changes were based on the experience of various school systems, but, more than any other, upon President Bush's experience with educational reform in Texas. President Bush and Secretary Paige believed that "under the current monopolistic system, public schools have no incentive to embark on substantial reforms or make major improvements because, no matter how badly they perform: their budgets will not be cut; their enrollment will not decline; and the school will not close down." Rod Paige, *Forward* to Krista Kafer, *School Choice 2003: How States are Providing Greater Opportunity in Education* vii, vii (Heritage Foundation 2003). Throughout President Bush's 2000 Presidential campaign, he emphasized the "Texas Miracle," the high level of

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[4] "Statement of U.S. Secretary of Education Rod Paige Regarding Introduction of H.R. 1," *United States Department of Education News* (March 22, 2001), at http://www.ed.gov/news/pressreleases/2001/03/03222001.html (last visited Sept. 9, 2003).

success that Texas had in raising test scores and improving the quality of education as a result of the reforms instituted by then-Governor Bush in Texas in 1995.

Both the Texas education reforms and the No Child Left Behind Act embodied a shift to a more competitive, results oriented model for the public school system. Under the Texas reforms, schools and school districts were given an increased level of control over internal management.[5] Importantly, State funding to the districts was made dependant on average daily attendance. TEX. EDUC. CODE ANN. § 42.101 (Vernon Supp. 2003). By making funding dependent upon attendance, school districts were put in the position of truly competing with surrounding schools. No longer would they have the benefit of the monopoly that Secretary Paige described, but would have to compete for their students with surrounding districts, charter schools and private schools. These changes expressly "establish a new form of accountability for public schools". TEX. EDUC. CODE ANN. § 12.001(a) (Vernon Supp. 2003).

Thus, faced with a new world of education law in which a superintendent is expected to run his school district in conformity with market forces, that is, like a business, and knowing that he has been given increased flexibility in the manner in which he may run the district, it is quite reasonable for a superintendent to begin to

[5] For instance, schools and districts were allowed to become charter schools and home-rule districts in order to provide an alternative and less restrictive manner of running the schools. TEX. EDUC. CODE ANN. § 12.0011 (Vernon Supp. 2003). Also, a school award system was implemented to reward progress or success in meeting educational goals. TEX. EDUC. CODE ANN. §§ 39.091-.092 (Vernon 1996).

implement policies similar to those found in the business world. A superintendent, recognizing his newly emphasized responsibility to be innovative in policies in order to boost the quality of the schools under his authority, could reasonably conclude that a patronage policy would assist him in adhering to the legislative mandate for educational reform.[6] Indeed, the Fifth Circuit acknowledged "[I]t is conceivable, as Smith suggests, that the public might interpret the decision of one or more senior public-school employees to enroll their children in a private school as a vote of no-confidence in [the] school district in which they work." App. 7 n.18. These factors serve to further undermine the conclusion that the law on patronage policies was clearly established.

CONCLUSION

The petition for writ of certiorari should be granted. As Chief Justice Burger acknowledged, the controlling law for patronage policies was unresolved in 1976. The issue has never been resolved by this Court. The Fifth Circuit's cases demonstrate that the law regarding patronage policies was not clearly established when Dr. Smith acted. Further, public officials should not be held to a higher standard of knowledge of constitutional law than federal district and circuit judges. Finally, statutory school law

[6] For instance, it is common-place for automobile manufacturers to expect their executives to drive models manufactured by the company, many clothing stores insist that their employees wear the store's merchandise while at work, and even soda companies frown upon consumption of competing beverages by their employees.

reform in Texas should be considered as part of the legal landscape in determining whether the applicability of court rulings may become less clear in light of the changed circumstances. This Court should grant Dr. Smith's petition, decide the law regarding patronage policies, and clarify the standards for determining what is clearly established law in the context of qualified immunity.

Respectfully submitted,

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APPENDIX A

REVISED JUNE 17, 2003

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-10351

KAREN JO BARROW,

Plaintiff-Appellant,

versus

GREENVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

HERMAN SMITH, DR.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed June 2, 2003)

Before KING, Chief Judge, and REAVLEY and STEWART, Circuit Judges.

REAVLEY, Circuit Judge:

Karen Jo Barrow claims that she was denied a public-school position because her children attended private school, an alleged violation of her constitutional right to educate her children in private school. The district court

rendered summary judgment for the school superintendent, Dr. Herman Smith, on the ground of qualified immunity, and certified it as final.[1] We reverse.

BACKGROUND

Barrow was a classroom teacher within the Greenville Independent School District in July 1998 when she learned of an opening at the district's middle school for the position of assistant principal. Barrow expressed her interest in the position, but was advised that to be considered for it she had to re-enroll her children in a public school. Barrow and her husband met with Smith, then district superintendent, who told them that the district required that the children of all principals and administrators attend public school. Barrow refused to comply with the district's policy, and as a result, the district did not consider her for the position of assistant principal.

Barrow initiated the instant action against the district and Smith under 42 U.S.C. § 1983. Smith moved for summary judgment asserting qualified immunity, allowing the court to assume for that limited purpose that he decided not to promote Barrow in part because she chose to educate her children in a private school. The district court determined that Barrow had failed to allege the violation of a clearly established constitutional right in 1998 and that Smith was therefore entitled to qualified immunity.

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[1] *See* FED. R. CIV. P. 54(b).

DISCUSSION

Whether a public official is entitled to qualified immunity requires that the court pass on two questions.[2] First, viewing the facts in a light most favorable to the plaintiff, the court must determine if the plaintiff has alleged the violation of a constitutional right.[3] The second question (which we need address only if we answer the first question in the affirmative) requires the court to determine if the constitutional right was clearly established when the violation supposedly occurred.[4] The right can be said to have been clearly established only if all reasonable officials in the defendant's position would have concluded that the challenged state action was unconstitutional.[5]

In her amended complaint, Barrow argued that Smith violated her right to select a private-school education for her children as guaranteed by the First Amendment and "the penumbra of familial privacy rights" (count I); her right under the Due Process Clause of the Fourteenth Amendment to direct the upbringing of her children (count

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[2] Smith argues that even if we reverse the district court's determination that he is entitled to qualified immunity this court can affirm the judgment below by finding that Barrow would not have received the assistant principal position anyway. He argues (1) that Barrow failed to complete a required written application for the position and (2) that the qualifications of other candidates were superior to Barrow's. Never having reached the merits of Barrow's claims, the district court of course did not address these arguments. On this record we cannot rule on these issues as a matter of law.

[3] *See Saucier v. Katz,* 533 U.S. 194, 201 (2001).

[4] *See id.*

[5] *See Cozzo v. Tangipahoa Parish Council,* 279 F.3d 273, 284 (5th Cir. 2002).

II); and her right under the Free Exercise Clause of the First Amendment to provide a religious education for her children (count III). We will consider these three claims together: at bottom all aver that Barrow, a public-school employee, has a constitutionally-protected right to select a private-school education for her children. Our inquiry at this stage is limited to the question whether there is a recognized constitutional right and not whether that right is grounded in the First Amendment, the Fourteenth Amendment, or both.

Twenty years ago, in *Brantley v. Surles*,[6] we said that "[t]he parental interest in the direction and control of a child's education is central to the family's constitutionally protected privacy rights."[7] We also recognized that constitutional rights take on a different hue in the context of public-school employment in light of the state's interest "in promoting efficiency in the educational services which it provides through its school employees."[8] Thus, the state may restrict its employee's constitutionally-protected conduct "whenever that conduct materially and substantially impedes the operation or effectiveness of the [state's] educational program."[9] The question presented in *Brantley* was whether a Mississippi school district superintendent could

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[6] 718 F.2d 1354 (5th Cir. 1983).

[7] *Id.* at 1358 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc. of Sisters*, 268 U.S. 510 (1925)). In *Meyer*, the Court recognized that parents have a protected liberty interest in the upbringing of their children under the Due Process Clause of the Fourteenth Amendment. 262 U.S. at 399-400. In *Pierce*, the Court held that the liberty interest described in *Meyer* protected the choice of parents to enroll their children in private school. 268 U.S. at 534-35.

[8] *Id.* at 1359.

[9] *Id.*

lawfully terminate Brantley, an elementary-school cafeteria manager, who decided to transfer her son to a segregated private school. Brantley was white and worked in a predominately black public school. The superintendent testified that interracial dissension "might" occur if Brantley's son continued to attend the segregated private school.[10] We rejected this justification for terminating Brantley, concluding that it "was unsupported by any objective evidence."[11]

Several years later we decided *Fyfe v. Curlee*.[12] The plaintiff in that case, a secretary to a school principal, also decided to enroll her daughter in a segregated private school. As a result, the school superintendent transferred her to a menial position with no responsibility. Relying on *Brantley*, we affirmed that the *Fyfe* plaintiff had a protected right to select a private-school education for her child "under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court."[13] In *Fyfe,* black families threatened to boycott businesses in the town in which the school district was located unless the district promised to not hire anyone whose children attended a segregated private school. However, the school district offered no evidence of a causal link between the threatened boycott and Fyfe's daughter's attendance of the private school. In the absence of evidence that Fyfe's choice of a private-school education for her daughter would substantially and materially interfere with the school

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[10] 765 F.2d 478, 480 (5th Cir. 1985) (appeal following remand).

[11] *Id.; cf. Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984).

[12] 902 F.2d 401 (5th Cir. 1990).

[13] *Id.* at 403.

district's operations and effectiveness we held that Fyfe must prevail as a matter of law.[14]

Our decisions in *Brantley* and *Fyfe* leave no doubt that public-school employees like Barrow have a protected right to educate their children in private school. The state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission. In this case, for purposes of this decision, Smith refused to consider Barrow for the position of assistant principal because her children attended private school. Refusal to promote is an adverse employment action.[15] Because Smith failed to present a fact issue that Barrow's children's attendance of a private school would negatively impair district operations were Barrow selected for assistant principal, the violation of a constitutional right is shown.

Brantley and *Fyfe* also confirm that the constitutional right of public-school employees to select a private-school education for their children was clearly established when Smith refused to consider Barrow for the position of assistant principal. Smith argues that *Brantley* and *Fyfe* do not give fair warning to all reasonable officials in his place that refusing to consider Barrow for the assistant principal position would be unconstitutional. Initially, we note that the question whether there was a clearly-established right does not turn on the existence of a court decision determining that conduct identical to that which

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[14] *Id.* at 405-06.

[15] *See Harrington v. Harris,* 118 F.3d 359, 365 (5th Cir. 1997).

is at issue here is unlawful.[16] Rather, the pertinent inquiry asks "whether the state of the law [in 1998] gave [Smith] fair warning that [his] alleged treatment of [Barrow] was unconstitutional."[17] Smith points out that the plaintiff-school employees in *Brantley* and *Fyfe* were in non-administrative positions, whereas Barrow sought the position of assistant principal. He suggests that requiring administrative employees to enroll their children in public schools better serves the district's interest in public confidence in the public school system than imposing a similar requirement on non-administrative employees does. Smith may be correct that the public tends to be more attuned to the personal educational decisions of the school district's administrative employees than of its other employees. We may also assume that the district's interest in public confidence in its schools is both legitimate and important.[18] However, our decisions in *Brantley* and *Fyfe* did not rest on a too-attenuated nexus between the public confidence in public schools and the personal educational

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[16] *See Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

[17] *See Hope v. Pelzer,* 122 S. Ct. 2508, 2516 (2002).

[18] Indeed, in some instances, the success of a public education program may depend on the perception that it is superior to that of both other public schools and private schools. *See Zelman v. Simmons-Harris,* 122 S. Ct. 2460 (2002) (upholding a state law authorizing parents to assign tax dollars to another public school or to a private school upon their decision not to enroll their children in the schools of the public-school district in which they reside). Further, it is conceivable, as Smith suggests, that the public might interpret the decision of one or more senior public-school employees to enroll their children in a private school as a vote of no-confidence in [sic] school district in which they work. The burden of the school district would then be to prove that the private school placement materially and substantially impeded the operation and the effectiveness of the state's educational program.

choices of cafeteria managers and secretaries. Instead, those decisions rely on our recognition that (1) public-school employees enjoy a protected right to enroll their children in private school, and (2) a state action that interferes with this protected right is unsustainable unless proved to further a state interest. *Brantley* and *Fyfe* require the state to prove that a state action that interferes with protected educational choices of its public-school employees furthers the state's interest in the efficient operation of its schools. Nothing about those two decisions suggests that the state can forgo this burden with respect to its more senior employees.[19] We therefore hold that no reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was constitutional.[20]

REVERSED and REMANDED.

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[19] In support of his claim that the right of public-school employees to enroll their children in private school is not clearly established, Smith offered the testimony of several professional educators, all of whom opined that patronage policies like the one in this case are lawful or are of uncertain legality. The question whether an asserted constitutional right is clearly established is one of law. Smith's subjective reasonableness has no place in our inquiry.

[20] In so holding, we express no opinion on the particular degree of scrutiny a state action must undergo to withstand a challenge to its constitutionality in a case like this one. Instead, we simply recognize that the state cannot strip its school employees of the right to choose a private-school education for their children without proving that the unfettered exercise of this right will undermine a state interest. Barrow and amici curiae argue that any state action that interferes with this right is subject to strict scrutiny. We need not take up this question today. In the absence of objective proof that Barrow's choice of a private-school education for her children will undermine a state interest the district's patronage policy fails irrespective of the degree of scrutiny applied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

KAREN JO BARROW,	§	
	§	
Plaintiff,	§	Civil Action No.
VS.	§	3:00-CV-0913-D
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	
	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Feb. 20, 2002)

A public school district Superintendent who refused to consider a prospective candidate for the position of middle school Assistant Principal unless she placed her children – who attended a private Christian school – in public school moves based on qualified immunity for summary judgment dismissing plaintiff's 42 U.S.C. § 1983 action seeking relief *inter alia* for alleged federal constitutional rights violations. Concluding that the Superintendent is entitled to qualified immunity, the court dismisses with prejudice plaintiff's federal-law claims against him and, in its discretion, dismisses without prejudice her state-law claims against him.

I

Plaintiff Karen Jo Barrow ("Barrow") sues defendants Greenville Independent School District ("GISD")[1] and Dr. Herman Smith ("Dr. Smith"),[2] its former Superintendent, alleging that her federal constitutional rights were violated when Dr. Smith refused to consider, interview, or recommend her to the GISD Board of Education for a school administrator position unless she enrolled her children in public school.[3] During July 1998, the time period relevant to this lawsuit, Barrow was a classroom teacher employed by GISD who was eligible and qualified to hold the position of Assistant Principal. Her school-age children were students at Greenville Christian School, a private religious school. Dr. Smith assumes for purposes of his summary judgment motion the factual truth of Barrow's assertion that he declined to consider, interview, or recommend her unless she placed her children in the public school system, *see* D. Br. at 1, and he moves for summary judgment based on qualified immunity.[4]

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[1] GISD has separately moved for summary judgment. The court will decide its motion separately in an opinion to be filed in due course.

[2] Barrow also sued Dr. Smith in his individual capacity under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The court dismissed that claim in a memorandum opinion and order filed July 17, 2000. Because Dr. Smith is no longer the GISD Superintendent, the court on December 4, 2001 substituted his successor as the defendant whom Barrow sues in his official capacity.

[3] Plaintiff asserts causes of action arising under Title V of the Texas Civil Practice and Remedies Code and Article I, § 6 of the Texas Constitution. The court dismisses these claims against Dr. Smith without prejudice.

[4] Barrow maintains that because Dr. Smith moves for summary judgment based only on qualified immunity, under this court's local civil

(Continued on following page)

II

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity likewise applies to state officials sued for constitutional violations pursuant to § 1983. *See id.* at n.30 (citing *Butz v. Economou,* 438 U.S. 478, 504 (1978)); *Morris v. Dearborne,* 181 F.3d 657, 665 (5th Cir. 1999)). "The Supreme Court has characterized the doctrine as protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Cozzo v. Tangipahoa Parish Council – President Gov't,* ___ F.3d at ___, 2002 WL 32810, at *6 (5th Cir. Jan. 10, 2002) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

To determine whether Dr. Smith is entitled to qualified immunity, the court must first answer the threshold question whether, taken in the light most favorable to Barrow as the party asserting the injury, the facts she has alleged show that Dr. Smith's conduct violated a constitutional right. *See Saucier v. Katz,* ___ U.S. ___, 121 S. Ct. 2151, 2156 (2001) ("A court required to rule upon the

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rules his motion should have been styled as one for partial summary judgment. She argues that the motion is therefore ambiguous and should be construed against Dr. Smith. *See* P. Br. at 4-5. The motion clearly seeks summary judgment based solely on the defense of qualified immunity. Because this defense, if successful, immunizes Dr. Smith from suit itself rather than merely from liability, *see, e.g., Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985), the motion is correctly styled as a motion for summary judgment rather than for partial summary judgment.

qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." (citing *Siegert v. Gilley,* 500 U.S. 226, 232 (1991))). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* If a violation could be made out on a favorable view of the parties' submissions, "the next, sequential step is to ask whether the right was clearly established." *Id.* "The objective reasonableness of allegedly illegal conduct is assessed in light of the rules clearly established at the time it was taken." *McClendon v. City of Columbia,* 258 F.3d 432, 438 (5th Cir. 2001) (footnote omitted). "Even if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable." *Id.* (footnote omitted). "'The defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the' plaintiff's asserted constitutional or federal statutory right." *Cozzo,* ___ F.3d at ___, 2002 WL 32810, at *6 (quoting *Thompson v. Upshur County, Tex.,* 245 F.3d 447, 457 (5th Cir. 2001)).[5]

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[5] This determination is a matter of law for the court to decide. *See Siegert,* 500 U.S. at 232. Similarly, the questions whether the applicable law was clearly established at the time of Dr. Smith's conduct and whether his conduct was objectively reasonable under the extant law are both questions of law for the court. *See Williams v. Bramer,* 180 F.3d 699, 703 (5th Cir. 1999) ("Objective reasonableness is a matter of law for the courts to decide, not a matter for the jury."). For these reasons,

(Continued on following page)

III

A

The court turns initially to the question whether Barrow has alleged a constitutional violation. Barrow asserts that, in his capacity as GISD Superintendent, Dr. Smith stated that he would not consider her for promotion to an administrative position with the GISD so long as she chose to educate her school-age children in a private school. *See* P. Am. Compl. at ¶¶ 6.29, 6.32.[6] She has introduced evidence in support of this allegation that, for purposes of this motion, Dr. Smith does not contest. Barrow does not allege that Dr. Smith expressed or acted upon an animus against Christian or religious private schools in particular, nor has she adduced any evidence in support of such a conclusion. Rather, she has presented proof that Dr. Smith sought to discourage or prevent GISD

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the court grants Dr. Smith's November 5, 2001 motion to strike Barrow's proffer of expert testimony by Allan E. Parker, Jr., Esquire ("Professor Parker"), a former law professor and present president of the Texas Justice Foundation. Because Professor Parker's expressed opinions regarding the state of the law and the reasonable actions of a school Superintendent in light of the law, *see* Dr. Smith App. (Mot. to Strike) at 22, do not "assist the trier of fact to understand the evidence or to determine a fact in issue," the court declines under Fed. R. Evid. 702 to admit them. Even assuming *arguendo* that Professor Parker's testimony were admitted, this evidence would not alter the court's conclusions regarding what rights were clearly established or whether Dr. Smith's actions were objectively reasonable.

[6] Barrow alleges that she was informed that "she would be required to remove her children from their private Christian education and to place them in a public school education within the independent school district where she resided." P. Am. Compl. at ¶ 6.29; *see id.* ¶ at 6.32 ("in either the [GISD] or another independent school district but not in private education").

administrators from enrolling their school-age children in any private school, regardless of religious affiliation. *See* D. App. 988, 870-71, 916-17, 1013-14, 1060-61. Barrow's deposition testimony confirms this view of Dr. Smith's motives. *See id.* at 783-785 (reproducing Barrow's testimony stating her view that, under Dr. Smith's requirements, she would remain ineligible for promotion to middle school Assistant Principal so long as her school-age children attended any private school, or any public school outside the jurisdiction of GISD).

Based on this conduct, Barrow alleges in her first amended original complaint ("amended complaint") that the following federal constitutional rights were abridged: (1) the right under the First and Fourteenth Amendments to protection of family relationships, the right to direct one's children's educations, and the right of familial privacy (count I); (2) a liberty interest and due process right under the Fourteenth Amendment Due Process Clause to make decisions concerning familial relationships and practices, including the direction and control of one's children's education (count II); and (3) the right under the First Amendment Free Exercise Clause to the free exercise of one's religious faith by choosing to educate one's children in a religious educational institution according to that faith (count III).[7] In sum, Barrow asserts violations of

[7] At the specific part of her brief in opposition to Dr. Smith's motion that addresses whether she has alleged a constitutional violation, she identifies the following violations as being set out in her amended complaint: (1) the right to educate one's children in a private religious educational institution, protected by the First Amendment and the penumbra of familial rights guaranteed under the First and Fourteenth Amendments; (2) the right under the Fourteenth Amendment to make

(Continued on following page)

her "First Amendment association rights, First Amendment free exercise right, First Amendment family and privacy rights, and the Plaintiff's liberty and due process rights guaranteed to her under the Fourteenth Amendment." P. Br. at 18. While Barrow refers to certain broadly-recognized constitutional rights, the inquiry into whether the facts alleged show a constitutional violation "must be undertaken in light of the specific context of the case, not as a broad general proposition[.]" *Saucier v. Katz,* ___ U.S. at ___, 121 S.Ct. at 2156.

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decisions concerning one's family relationships, including the direction and control of one's children's educations; and (3) the First Amendment right to exercise freely and to practice one's religious faith. *See* P. Br. at 17-18 n.16. Elsewhere in her brief, she identifies as the clearly established constitutional rights at issue "the fundamental right under the First and Fourteenth Amendments of parents to direct the care, custody, control, upbringing, association, and education of their children." *Id.* at 1. She also specifies as a constitutional right the prohibition against government's burdening a citizen's exercise of religion absent a compelling state interest for doing so. *Id.* at 2. In the course of arguing that the constitutional rights she asserts were clearly established, Barrow contends she had a First Amendment right and liberty interest in the care, custody, control, upbringing, association, and education of her children that is protected by the substantive component of the Fourteenth Amendment Due Process Clause and a right not to have the exercise of that right or interest burdened by government action. *Id.* at 19-20. She argues that when this fundamental right or interest, or her First Amendment right of association, are burdened, the government's actions are subject to strict scrutiny and will be upheld only when the restrictions are narrowly tailored to a compelling government interest. *Id.* at 19-20. In the subheadings under the part of her brief that addresses whether her constitutional rights were clearly established, Barrow identifies these rights: (1) a substantive due process right to make a family decision to educate the family's children in a private religious school, *id.* at 20; and (2) to exercise freely her religion by sending her children to a religious school, *id.* at 25.

1

The court considers first Barrow's parental rights claims under the First and Fourteenth Amendments.[8] Barrow relies on the recent statement by the Supreme Court in *Troxel v. Granville,* 530 U.S. 57, 65 (2000) (plurality opinion), that one of "the fundamental liberty interests" recognized under the Constitution is the "interest of parents in the care, custody, and control of their children." She argues that this interest has long been recognized in constitutional jurisprudence, citing such cases as *Meyer v. Nebraska,* 262 U.S. 390, 401 (1923) (concluding that liberty interest protected by due process includes right of parents "to control the education of their own"); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925) (holding that "the liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"); and *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944) (recognizing constitutional interest of

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[8] The court considers together the claims that Barrow asserts in counts I and II of her amended complaint. This approach is consistent with the one the Fifth Circuit has taken in several cases that involve similar factual and legal allegations. *See, e.g., Kipps v. Callier,* 205 F.3d 203, 204-05 (5th Cir. 2000) (on rehearing) (analyzing under framework of Fourteenth Amendment "liberty interest in familial association" employee's claim that employment action taken by state university interfered with employee's freedom of association with his son); *see also Cook v. Hudson,* 511 F.2d 744, 745 (5th Cir. 1975) (applying same analysis to plaintiffs' First Amendment freedom of association and Fourteenth Amendment due process claims in school discharge context). In this respect, her First and Fourteenth Amendment rights are related. *See Fyfe v. Curlee,* 902 F.2d 401, 403 (5th Cir. 1990) ("Mrs. Fyfe's decision to send her child to a private school was protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court.")

parents in directing "custody, care and nurture of the child"). Barrow argues that these cases, taken together, require that strict scrutiny review be applied to Dr. Smith's conduct. *See* P. Br. at 19-23. The court disagrees.

The Fifth Circuit recently reviewed this line of cases in addressing an assertion of parental rights in a public school context. It concurred with decisions of other circuits, and of the district court, that under *Meyer, Pierce,* and *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the rational-basis test is the appropriate standard of review. *Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275, 291 (5th Cir. 2001); *see also Cook v. Hudson,* 511 F.2d 744, 747 (5th Cir. 1975) (holding that patronage policy was constitutional based on "determination that the rational relation test had been met"). The *Littlefield* panel held that "*Troxel* does not change the above reasoning in the context of parental rights concerning public education." *Littlefield,* 268 F.3d at 291. It also stated that "[i]t has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation." *Id.* (citing *Runyon v. McCrary,* 427 U.S. 160, 177 (1976) (recognizing no parental right to educate children in private segregated academies)).

Where rational-basis scrutiny applies,

> the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative "'any reasonably conceivable state of facts that could provide a rational basis for the [regulation].'"

Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (quoting *Heller v. Doe,* 509 U.S. 312, 320 (1993);

FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)); *see also Cook*, 511 F.2d at 749-50 (Roney, J., concurring) (stating that where plaintiffs were barred from continued employment with school district because of failure to comply with school's patronage policy, "[t]he plaintiffs had the burden of proving that the action of the school authorities in failing to rehire them was unconstitutional.").

Although the court rejects Barrow's reliance on a strict scrutiny standard to establish a constitutional violation, she also alleges in her amended complaint that her "decision to educate her children in a private education system as opposed to a public education system does not materially and substantially interfere with the effectiveness of the Greenville Independent School District." P. Am. Compl. at ¶ 7.10. The court construes this assertion to posit that the patronage requirement would fail under rational basis review, as well.[9] The court therefore holds that Barrow has alleged a violation of her parental rights under the First and Fourteenth Amendments.

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[9] This passage from Barrow's amended complaint, which uses language referring to material and substantial interference with the effectiveness of the school district's operations, can be found in Fifth Circuit decisions such as *Brantley v. Surles*, 718 F.2d 1354, 1359 (5th Cir. 1983), and *Fyfe*, 902 F.2d at 404, that similarly address the constitutionality of school district patronage policies. The court reads these cases, and prior precedent, as applying the equivalent of rational basis scrutiny. *See also Cook*, 511 F.2d at 746-47 (upholding school patronage policy under "rational relation" review based on district court finding "that the challenged policy was significantly related to a teacher's effectiveness and job performance").

The court turns next to Barrow's claim that Dr. Smith violated her First Amendment right to the free exercise of religion. As with her cause of action based on parental rights, Barrow argues that strict scrutiny is the applicable standard of review. *See* P. Br. at 2. Barrow neither has alleged that Dr. Smith expressed or acted upon an animus against Christian or religious private schools in particular, nor has she adduced any evidence to support such a conclusion. Viewed favorably to her, Barrow's summary judgment evidence shows only that Dr. Smith sought to discourage or prevent GISD administrators from enrolling their school-age children in any private school, regardless of the institution's particular religious affiliation. *See* D. App. 988, 870-71, 916-17, 1013-14, 1060-61.

Barrow argues that because, as in *Yoder,* she has alleged a violation of both her Fourteenth Amendment parental rights and her First Amendment free exercise rights, strict scrutiny applies. In Judge Maloney's opinion in *Littlefield,* he examined the origins of, and recent case law addressing, this so-called "hybrid rights" approach. In accordance with the reasoning of the First, Sixth, Ninth, and Tenth Circuits, he explicitly declined to adopt it. *Littlefield v. Forney Indep. Sch. Dist.,* 108 F.Supp.2d 681, 705-06 (N.D. Tex. 2000) (Maloney, J.), *aff'd, Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275 (5th Cir. 2001). In affirming Judge Maloney's decision, the Fifth Circuit similarly declined to recognize a "hybrid rights" avenue for

achieving a heightened standard of review. *See Littlefield,* 268 F.3d at 292-95.[10]

Based on the allegations and evidence at issue, the court concludes that Dr. Smith's school attendance requirement constituted a neutral, generally applicable regulation that was not enacted to inhibit a particular faith or religion in general. Accordingly, it "will withstand a free exercise challenge when the regulation is reasonably related to a legitimate state interest." *Littlefield,* 268 F.3d at 292 (citing *Employment Div., Dept. of Human Res. of Or. v. Smith* 494 U.S. 872, 885 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hileah,* 508 U.S. 520, 531 (1993)). Because Barrow alleges in her amended complaint that her decision to educate her children in a private rather than public school system does not materially and substantially interfere with the effectiveness of GISD, P. Am. Compl. at ¶ 7.10 – an assertion that states a rational basis claim – the court holds that she has alleged the violation of her right to the free exercise of religion.

B

Because Barrow has alleged violations of constitutional rights, the court must now decide whether the rights were clearly established in July 1998, when the conduct at issue occurred. *See Wooley v. City of Baton*

[10] In *Peterson v. Minidoka County Sch. Dist.,* 118 F.3d 1351, 1357 (9th Cir. 1997), a case involving an elementary school principal who desired to home school his children, the Ninth Circuit applied strict scrutiny where the plaintiff alleged violations of both his parental and free exercise rights. This court is obligated, of course, to follow binding precedent of the Fifth Circuit.

Rouge, 211 F.3d 913, 919 (5th Cir. 2000) (stating that "the applicable law that binds the conduct of officeholders must be clearly established at the very moment that the allegedly actionable conduct was taken.") (citing *Stem v. Ahearn,* 908 F.2d 1, 5 (5th Cir. 1990)). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition[.]" *Saucier,* ___ U.S. at ___, 121 S.Ct. at 2156. The court must determine whether "the contours of [the] right asserted are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *White v. Taylor,* 959 F.2d 539, 544 (5th Cir. 1992). "The standard is formulated at this level of generality in order to afford the measure of protection that the doctrine is intended to confer." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* ___ U.S. at ___, 121 S.Ct. at 2156.

Court decisions in effect at the time of Dr. Smith's actions established as a broad, general proposition that constitutionally-protected parental and free exercise rights applied in the public school context. In the more relevant circumstances of rights held by persons who sought employment as public school administrators, however, the rights clearly established in July 1998 were qualified rather than absolute. "[In] the realm of public school employment, the court must balance the interests of the school employee with the interest of the state in promoting efficiency in the educational services which it provides through its school employees." *Fyfe v. Curlee,* 902 F.2d 401, 405 (5th Cir. 1990) (quoting *Brantley v. Surles,* 718 F.2d 1354, 1359 (5th Cir. 1983)). Under this balancing test,

although the state's power to impede a person's constitutional rights was limited, it could "legitimately interfere with the constitutionally protected conduct of a public school employee whenever that conduct materially and substantially impede[d] the operation or effectiveness of the educational program." *Brantley,* 718 F.2d at 1359; *accord Fyfe,* 902 F.2d at 405 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1969)).

In his brief, Dr. Smith argues that his decision not to hire as administrators candidates who chose private education for their children was in part justified by a desire to signal to parents considering educating their children in the GISD that top-level administrators were loyal to, and believed in, the public education system. *See* D. Br. at 43. This single justification could alone serve as a rational basis for requiring Barrow to place her children in public school in order to be eligible for promotion to an administrator position. The Supreme Court and the Fifth Circuit have each recognized the significant state interest in promoting the effective functioning of the public schools. Supported by appropriate objective evidence, a patronage requirement could conceivably be shown to materially and substantially advance the effectiveness of GISD's educational program.[11] Given the qualified nature of the constitutional

[11] In its focus on administrative personnel, the requirement in the present case differs from the ones in *Fyfe,* 902 F.2d at 405 (elementary school principal's secretary); *Brantley,* 718 F.2d at 1359 (cafeteria worker); and *Stough v. Crenshaw County Bd. of Educ.,* 744 F.2d 1479, 1482 (11th Cir. 1984) (classroom teacher), where in each case there was "no evidence" that the plaintiff's noncompliance with the patronage policy would materially and substantially interfere with the effectiveness of the school system.

rights Barrow asserts, the court holds that it was not clearly established in July 1998 that the school patronage requirement at issue violated those rights.[12]

Accordingly, Dr. Smith is entitled to qualified immunity because Barrow has failed to demonstrate in the specific relevant context that she has alleged a violation of a clearly established right.

C

To prevail against Dr. Smith's defense of qualified immunity, Barrow must also demonstrate that he was objectively unreasonable in his belief that the requirement he imposed was rationally related to the legitimate state objective of enhancing the functioning of the public school system. This would entail proof that all reasonable officials in his circumstances would have known that such conduct violated Barrow's constitutional rights. *See Cozzo*, ___ F.3d at ___, 2002 WL 32810, at *6.

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[12] The Fifth Circuit holds that a final step in the qualified immunity inquiry requires that the court consider whether "the record shows that the violation occurred, or at least gives rise to a genuine issue of material fact as to whether the defendant actually engaged in conduct that violated the clearly-established right." *Morris*, 181 F.3d at 666 (quoting *Kerr v. Lyford*, 171 F.3d 330, 339 (5th Cir. 1999)). Because Barrow bears the burden of proving that Dr. Smith's requirement was not rationally related to a legitimate state interest, and she has adduced no evidence that would permit a reasonable trier of fact to find that she has satisfied the factual components of this burden, Dr. Smith is entitled to summary judgment on the additional ground that no genuine issue of material fact is present concerning his liability for a constitutional violation.

The court holds that *all* reasonable officials would *not* have known of such a violation. A reasonable Superintendent could have concluded that it was constitutional in July 1998 to condition a public school administrator's employment on sending her children to public school, once the Superintendent determined that not imposing such a restriction would materially and substantially impede the operation and effectiveness of the educational program. *See Kipps v. Callier,* 197 F.3d 765, 769 (5th Cir. 1999) (holding head football coach's firing of assistant coach on basis that assistant coach's son chose to attend rival college to be objectively reasonable where desire to enhance recruiting and alumni relations by preserving image of loyalty was cited as reason for firing), *modified on rehearing on other grounds,* 205 F.3d 203 (2000).[13] Dr. Smith is therefore entitled to qualified immunity on this additional ground.

IV

Barrow contends that qualified immunity extends only to civil damages but not to nominal damages or injunctive relief. The court disagrees. Qualified immunity is "an entitlement not to stand trial or face the other

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[13] Barrow maintains that there is summary judgment evidence that Dr. Smith admitted he knew that considering where Barrow chose to educate her children was inappropriate and would violate clearly established employment law. *See* P. Br. at 47-48 (citing P. App. 249-50). It is well settled, however, that "an individual defendant's subjective state of mind is irrelevant to the qualified immunity inquiry." *Cozzo,* ___ F.3d at ___, 2002 WL 2002 WL [sic] 32810, at *7; *see also Kipps,* 197 F.3d at 769 (citing *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1187 (5th Cir. 1990); *Malley,* 475 U.S. at 341).

burdens of litigation." *Mitchell v. Forsyth,* 472 U.S. 551, 526 (1985). "The [qualified immunity] privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Saucier,* ___ U.S. at ___, 121 S.Ct. at 2156 (quoting *Mitchell,* 472 U.S. at 526).

V

"[W]hen all federal claims are dismissed or otherwise eliminated from a case prior to trial, [the Fifth Circuit has] stated that [its] 'general rule' is to decline to exercise jurisdiction over the pendent state law claims." *McClelland v. Gronwaldt,* 155 F.3d 507, 519 (5th Cir. 1998) (citing *Wong v. Stripling,* 881 F.2d 200, 204 (5th Cir. 1989)). Accordingly, the court dismisses without prejudice Barrow's state-law claims against Dr. Smith.

* * *

Dr. Smith's October 1, 2001 motion for summary judgment is granted.[14] The federal-law claims against him

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[14] Dr. Smith objects to some evidence contained in Barrow's appendix. Because he is entitled to qualified immunity regardless whether these challenged items are considered, his November 8, 2001 objections to plaintiff's evidence are overruled.

Dr. Smith moves to substitute a revised copy of his own affidavit for the copy that was originally included in his appendix. The revised affidavit corrects certain page references and other citations that were the subject of typographical errors or were omitted in the original appendix. Because Barrow has not responded to the motion and the court discerns no prejudice that will result from granting this relief, Dr. Smith's December 12, 2001 motion for leave to substitute evidence is granted.

are dismissed with prejudice and the state-law claims are dismissed without prejudice. In view of this decision, Barrow's October 1, 2001 motion for partial summary judgment is denied.

SO ORDERED.

February 20, 2002.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	3:00-CV-0913-D
	§	
	§	
Defendants.	§	

JUDGMENT

(Filed Feb. 20, 2002)

For the reasons set out in memorandum opinions and orders filed July 17, 2000 and today, it is ordered and adjudged that plaintiff's federal-law claims against defendant Dr. Herman Smith ("Dr. Smith") are dismissed with prejudice and her state-law claims against Dr. Smith are dismissed without prejudice.

Dr. Smith's taxable costs of court, as calculated by the clerk of court, are assessed against plaintiff.

Pursuant to Fed. R. Civ. P. 54(b), the court expressly determines that there is no just reason for delay and directs the clerk of court to enter this as a final judgment.

Done at Dallas, Texas this 20th day of February, 2002.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW, Plaintiff,	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	3:00-CV-0913-D
Defendants.	§	

ORDER

(Filed Mar. 4, 2002)

Plaintiff Karen Jo Barrow's ("Barrow's") March 1, 2002 motion to alter or amend judgment is denied. Although the court need not address plaintiff's arguments, one part of the court's February 20, 2002 memorandum opinion and order may benefit from the following clarification.

Barrow maintains that "[t]he Court is incorrect that the Fifth Circuit has *rejected* the hybrid-rights analysis when different constitutional protections are involved." P. Mot. at 6 (emphasis added). The court did not state that the Fifth Circuit had *rejected* hybrid-rights analysis. What it said was that, in *Littlefield v. Forney Independent School District*, 268 F.3d 275 (5th Cir. 2001), "[i]n affirming Judge Maloney's decision, the Fifth

Circuit similarly *declined to recognize* a 'hybrid rights' avenue for achieving a heightened standard of review." Mem. Op. at 9 (emphasis added). It is correct that the *Littlefield* panel "declined to recognize" hybrid rights. *See Littlefield*, 268 F.3d at 293 n.27. However, the court's use of the phrase "similarly declined to recognize" could lead to the conclusion that it was holding that the Fifth Circuit had explicitly decided the question, as had Judge Maloney. Accordingly, to clarify this court's holding and avoid such confusion, the court amends the following sentence on page 9 of its memorandum opinion and order from

> In affirming Judge Maloney's decision, the Fifth Circuit similarly declined to recognize a "hybrid rights" avenue for achieving a heightened standard of review. *See Littlefield*, 268 F.3d at 292-95.

to

> In affirming Judge Maloney's decision, the Fifth Circuit noted his ruling but did not address the issue because it had been abandoned on appeal. *See Littlefield*, 268 F.3d at 293 n.27.

In all other respects the memorandum opinion and order shall remain as filed.

Barrow's March 1, 2002 motion to alter or amend judgment is denied.

SO ORDERED.

March 4, 2002.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT
JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10351

KAREN JO BARROW

Plaintiff-Appellant

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT; ET AL

Defendants

HERMAN SMITH, DR

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Filed July 02, 2003)

(Opinion 6/2/03, 5 Cir., _____, _____ F.3d _____)

Before KING, Chief Judge, REAVLEY and STEWART, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX F

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).